BRB No. 02-0102 BLA

BILLY E. DILLON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARROWBONE DEVELOPMENT COMPANY	)	DATE ISSUED:
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-In-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle Keenan & Childers P.S.C.), South Williamson, Kentucky, for claimant.

Mary Rich Maloy and Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Jennifer U. Toth (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (00-BLA-0711) of Administrative Law Judge Gerald M. Tierney (the administrative law judge) on a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] The administrative law judge initially found that claimant established a material change in conditions under 20 C.F.R. §725.309 (2000)[2] inasmuch as the newly submitted evidence establishes a totally disabling respiratory or pulmonary impairment. The administrative law judge further found that the evidence of record, considered in its totality, establishes a totally disabling respiratory or pulmonary impairment. The administrative law judge also determined, however, that the evidence of record fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and (a)(4) and pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[3] Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge's finding that the medical opinions fail to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) is not supported by substantial evidence. Claimant asserts that the opinions of Drs. Westerfield, Myers, Ranavaya, Gaziano and Younes constitute evidence that he has pneumoconiosis, and argues that the administrative law judge should have relied upon the opinion of claimant's treating

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The amendments to the revised regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

[3]The administrative law judge made no findings under 20 C.F.R. §718.202(a)(2) or (a)(3). However, there is no biopsy or autopsy evidence, *see* 20 C.F.R. §718.202(a)(2), and the presumptions referred to in 20 C.F.R. §718.202(a)(3), namely 20 C.F.R. §§718.304, 718.305 and 718.306, do not apply in this case.

physician, Dr. Younes. Claimant further argues that application of the revised regulations at 20 C.F.R. §§718.104(d), 718.201, 718.204(c)(1) and 725.414 would result in a favorable decision. Employer has filed a response brief, and urges the Board to affirm the decision below. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief limited to claimant's arguments regarding application of the revised regulations. The Director has also filed a brief in reply to employer's response brief.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We affirm the decision below. Claimant's recitation of medical opinion evidence supportive of a finding of the existence of pneumoconiosis and assertion that the administrative law judge should have relied on Dr. Younes' opinion based on his status as claimant's treating physician, do not meet his burden to specify error in the decision below. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Moreover, the administrative law judge is not obligated to accord determinative weight to Dr. Younes' opinion based on his finding that Dr. Younes was the miner's treating physician "for about two years," Decision and Order at 7. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge properly accorded less weight to Dr. Younes' opinion regarding the existence of pneumoconiosis because the physician diagnosed chronic obstructive pulmonary disease and chronic bronchitis which he attributed, in part, to claimant's coal mine employment, yet indicated, in a supplemental questionnaire, that claimant had no occupational disease related to his coal mine employment. *See* Director's Exhibit 11.

Further, we find little merit in claimant's arguments in support of his position that the amendments resulting in the revised regulations at 20 C.F.R. §§718.104(d), 718.201, 718.204(c)(1) and 725.414 should have affected the outcome of the case in claimant's favor. The revised regulation at 20 C.F.R. §718.104(d) requires an administrative law judge to take into consideration five certain factors in weighing the opinion of a miner's treating physician, and is applicable to all evidence developed by any party after January 19, 2001. 20 C.F.R. §§718.104(d), 718.101(b). Because Dr. Younes' report and supplemental questionnaire were developed in February of 1999, and not after January 19, 2001, the revised regulation at 20 C.F.R. §718.104(d) is not applicable. 20 C.F.R. §718.101(b). Moreover, the revised regulation at 20 C.F.R. §718.104(d) does not require an administrative law judge to accord determinative weight to the opinion of a miner's treating physician in all

circumstances. Rather, the regulation at 20 C.F.R. §718.104(d) requires the administrative law judge to give consideration to the relationship between the miner and any treating physician whose report is admitted in the record, by assessing certain factors. 20 C.F.R. §718.104(d). Accordingly, claimant's argument that application of the revised regulation at 20 C.F.R. §718.104(d) would result in a favorable decision must fail.

Likewise, we find no merit in claimant's contention that application of the revised regulation at 20 C.F.R. §718.201(a)(2), defining "legal pneumoconiosis" as including any chronic restrictive *or obstructive* pulmonary disease arising out of coal mine employment, would result in a favorable decision. The revised regulation at 20 C.F.R. §718.201(a)(2) does indeed apply in this case which was pending on January 19, 2001. 20 C.F.R. §725.2(c). However, while the administrative law judge did not refer to this amendment, he made no evidentiary findings which were inconsistent with the revised regulatory definition of pneumoconiosis. Specifically, the administrative law judge, in considering the sufficiency of the medical opinions to establish the existence of pneumoconiosis, properly found that an opinion which credibly establishes a causal nexus between the miner's respiratory or pulmonary condition and his exposure to coal mine dust "may suffice to establish the existence of pneumoconiosis," Decision and Order at 5. 20 C.F.R. §§718.201, 718.202. Moreover, the administrative law judge correctly determined that Dr. Younes' attribution of claimant's chronic obstructive pulmonary disease and chronic bronchitis to his occupational coal dust exposure as a secondary cause, *see* Director's Exhibit 11, "suffices as a diagnosis of pneumoconiosis," Decision and Order at 7. 20 C.F.R. §§718.201, 718.202(a)(4). Thus, claimant's argument must fail.

Claimant also asserts that the amendments made to 20 C.F.R. §718.204(a) and (c), relevant to a claimant's burden to establish total disability due to pneumoconiosis, should have resulted in a favorable decision. We disagree. The revised regulation at 20 C.F.R. §718.204 does apply in this case. *See* 20 C.F.R. §725.2(c). The administrative law judge, however, did not consider the sufficiency of the relevant evidence regarding claimant's burden to establish total disability due to pneumoconiosis because claimant failed to establish the existence of pneumoconiosis. *See* Decision and Order at 7. We thus do not further address claimant's arguments in this regard.

Lastly, claimant asserts that had the amount of x-ray evidence been restricted by the evidentiary limitations contained in the revised regulation at 20 C.F.R. §725.414, at least 18 x-ray readings would have been eliminated which would have materially affected the outcome of the case. The revised regulation at 20 C.F.R. §725.414 is not applicable to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2(c). We thus reject claimant's assertion in this regard.

In light of the foregoing, we affirm the administrative law judge's denial of benefits

based on his finding that the evidence of record fails to establish the existence of pneumoconiosis, an essential element of entitlement. 20 C.F.R. §718.202; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). We further reject claimant's arguments pertaining to the applicability and/or effect of certain revised regulations.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge